Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78 - 78-732

JAMES L. SWISHER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

Counsel for Petitioner

Norman B. Smith
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, N. C. 27401

Richard J. Tuggle
James N. Duggins, Jr.
Tuggle, Duggins, Meschan,
Thornton & Elrod
228 West Market Street
Greensboro, N. C. 27401

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Fourth Circuit in this case was entered on September 27, 1978. It is an unpublished opinion. The opinion is set forth in the appendix hereto, p. 14. No opinion in this case was rendered by the United States District Court for the Middle District of North Carolina.

JURISDICTION OF THIS COURT.

The decision of the United States Court of Appeals for the Fourth Circuit sought to be reviewed here was dated and entered on September 27, 1978. Petition for rehearing before the Court of Appeals was denied on October 25, 1978. Jurisdiction of this court is based on 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Under 18 U.S.C. sec. 1510 is it a criminal offense (a) to procure the misrepresentation of a witness to a government agent, rather than to make a misrepresentation to the witness, and (b) to attempt to procure the misrepresentation of a witness?

2. Does a misrepresentation under 18 U.S.C. sec. 1510 contain as necessary elements the intent and effect of deceiving the victim?

3. Is it error to instruct the jury that ignorance of the law is not a defense under 18 U.S.C. sec. 1510, which contains the element of willfulness?

STATUTE INVOLVED.

18 U.S.C. sec. 1510

> (a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of

> information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; . . .
>
> Shall be fined not more than $5000.00, or imprisoned not more than five years, or both.

STATEMENT OF THE CASE.

Petitioner was prosecuted in the United States District Court for the Middle District of North Carolina on a multi-count bill of indictment alleging violation of 18 U.S.C. sec. 1510. The indictment charged that petitioner endeavored by means of misrepresentation to interfere with communication of information by named individuals relating to a violation of the criminal tax fraud statute, 26 U.S.C. sec. 7201, to special agents of the Internal Revenue Service. The case was tried in District Court on July 12-15, 1977. Petitioner was found guilty on six counts of the indictment. He received an active sentence of three years. Jurisdiction of the District Court was based on 18 U.S.C. sec. 3231.

The judgment of the District Court was affirmed by United States Court of Appeals for the Fourth Circuit in an opinion entered on September 27, 1978.

A special agent of the Internal Revenue Service was assigned to investigate petitioner for tax fraud. The agent prepared a circular letter to be mailed to persons identified as clients of petitioner, an attorney, based on courthouse records.

The letter stated that an investigation was being conducted concerning petitioner's 1973, 1974, and 1975 tax returns, and requested the completion and mailing back of a form indicating the payments made to petitioner and his partner during the years in question.

The witness Charles Edward Angel told the special agent he had paid petitioner a $500.00 legal fee. He then called petitioner to find out the date the payment was made. He stated petitioner told him just to put $50.00 down. Angel followed this advice. It was established that Angel's payment to defendant was in 1972 and not during the years in question, so that the form should have been completed with zeros.

The witness Harry Wayne Coble testified that he asked petitioner what should be done with the form letter. Petitioner told him to put down zeros and not to worry about it. Coble followed this advice. In 1975 Coble paid petitioner $50.00 to take care of a traffic ticket, but he does not know how much the fine and court costs were or whether or not they consumed the entire $50.00. At various times petitioner had provided him legal services without charge.

The witness Winfred Lee Myrick was told by petitioner to "put down nothing" on the form and to send it back. He did so. In 1975, petitioner had represented Myrick's son in a traffic case for which Myrick paid him a $100.00 fee during that year, and also during the same year petitioner had handled a real estate closing for Myrick's

mother for which Myrick paid $25.00.

Cindy L. Wyrick was told by petitioner that if she received a form letter she should say that she had not paid petitioner any money. During the years in question petitioner had represented her husband James Wyrick in various cases, but the witness had never paid petitioner any of his fees.

The witness James Milton Wyrick had a telephone conversation with petitioner, which was recorded at the Internal Revenue Service offices. Petitioner told Wyrick that if he received a communication from the Internal Revenue Service, he should tell them that he had not paid petitioner any money. Petitioner told the witness that neither of them had any receipts or records. Wyrick testified he had paid petitioner $3000.00 for legal representation in 1975, and an unspecified amount in 1974.

Francis Aaron Wyrick also had a telephone conversation with petitioner recorded by the Internal Revenue Service. Petitioner told the witness to tell the Internal Revenue Service that he had not paid anything, did not owe petitioner anything, and had not been charged anything during the years in question. In 1973 and 1974, Wyrick paid petitioner $300.00 or $400.00 in legal fees each year, and in 1975, the amount was about $3000.00.

REASONS FOR ALLOWING THE WRIT.

The petition for writ of certiorari ought to be granted because the Court of Appeals decided federal questions in ways in conflict with applicable decisions of this court, as set out in Parts I and III hereof, and has decided an important question of federal law which has not been, but should be, settled by this court, as is set out in Part II hereof.

I. THE INVESTIGATION OBSTRUCTION STATUTE, 18 U.S.C. sec. 1510, REACHES NEITHER (A) MISREPRESENTATIONS BY WITNESSES PROCURED BY THE DEFENDANT, AS DISTINGUISHED FROM MISREPRESENTATIONS BY THE DEFENDANT TO WITNESSES, AND (B) ATTEMPTS BY THE DEFENDANT TO PROCURE MISREPRESENTATIONS BY WITNESSES.

A. Section 1510 Cannot be Construed to Include Procuring Misrepresentations by Witnesses.

On its face 18 U.S.C. sec. 1510 is designed to protect witnesses from several types of improper pressures -- bribery, misrepresentation, intimidation, force, and threats. The evil which this statute seeks to remedy is the victimization of the potential witness by the person being subjected to a federal investigation, not the confederation of the potential witness with the person being investigated. As stated in the Senate Judiciary Committee Report, "[T]he sole purpose of the bill is to protect informants and potential witnesses against intimidation or injury by third persons designed to prevent or discourage

them from talking to government investigators." Senate Report No. 307, 90th Cong. 1st Sess. 5 (1967).

The House Judiciary Committee in its report suggested that misrepresentations by witnesses procured by defendants also come within the proscription of the statute. House Report No. 68, 1 U.S. Cong. & Admin. News, p. 1762 (1967). This suggestion was followed by the court below.

There is dictum supporting this interpretation in United States v. St. Clair, 552 F.2d 57, 58 (2d Cir. 1977), but there is dictum disapproving this interpretation in United States v. Cameron, 462 F.2d 1394, 1402 (5th Cir. 1972). The suggestion by the House Judiciary Committee is an abrupt departure from the statutory plan of protecting witnesses. Curiously the report contains no parallel suggestion that a defendant who has caused a witness to bribe, intimidate, or use force or threats against an officer, is also culpable. Only the term misrepresentation is dealt with in this unique fashion.

The views of the authors of the House Judiciary Committee Report are far from obvious on the face of the statute, and are not found in any of the legislative history generated in the Senate. Section 1510 was passed by the Senate on June 13, 1967, three months before the House Report was printed on September 22, 1967, with passage of the legislation by the House following on October 19, 1967. The legislation was unchanged from its Senate version when it passed the House. 1 U.S. Cong. & Admin. News 1760 (1967). Because of this sequence, judicial

reliance on the House committee report is altogether improper. Disapproving a similar interpretation of the Freedom of Information Act, the court in Hawkes v. Internal Revenue Service, 467 F.2d 787, 797 (6th Cir. 1972), stated that it "would be to allow a single house of Congress to effectively alter the meaning placed on proposed legislation by the other house without altering a word of the text. We do not believe this represents a wise approach to statutory construction."

Moreover, extension of the statute to procurement of misrepresentations by witnesses is inconsistent with two well established canons of statutory construction. The first is the doctrine of strict construction of criminal statutes, which holds that ambiguities must be resolved in favor of the defendant. Rewis v. United States, 401 U.S. 800, 812 (1971); United States v. Enmons, 410 U.S. 396, 411 (1973). In the latter case, this court invoked this rule of construction to determine that the Hobbs Act is inapplicable to violence committed during a lawful strike, even though Congress had removed from the statute an exclusion for violence to obtain wages in an employee-employer relationship, and had refused to restore other similarly worded exclusions. Although Section 1510 appears clearly on its face not to reach procured misrepresentations by witnesses, it is at most ambiguous in this connection. Under the rule of strict construction the ambiguity must be resolved in petitioner's favor, so that there can be no criminal liability merely for procuring a misrepresentation by a witness.

The other canon of construction is the associated words or noscitur a sociis maxim, which provides that the meaning of ambiguous words is to be determined by reference to their association with other words. Neal v. Clark, 95 U.S. 704, 709 (1877). In Section 1510, the word "misrepresentation" is associated with the words "bribery, . . . intimidation, or force or threats thereof". These associated terms all relate unmistakingly to wrongful conduct against witnesses, not the procurement of wrongful conduct of witnesses.

B. Section 1510 does not Encompass Attempts to Procure Misrepresentations by Witnesses.

Even if the statute is not limited to misrepresentations to witnesses, but extends to causing witnesses to make misrepresentations, it is clearly improper to extend the statute further to embrace attempts to cause witnesses to misrepresent. On its face the statute punishes one who "endeavors by means of . . . misrepresentation . . . to obstruct, delay, or prevent" the communication of information to a criminal investigator. The word "endeavors" unquestionably modifies the words "obstruct, delay, or prevent", not the word "misrepresentation".

It is well established that there is no general law of attempts in the federal criminal code. An attempt to commit a federal offense is itself an offense only when the statute defining the offense specifically includes an attempt within its proscription. United States v. Joe, 452 F.2d 653 (10th

Cir. 1971); United States v. Rosa, 404 F.Supp. 602 (W.D.Pa. 1975); Cf., Rule 31(c), F.R.Cr.P. Because attempted misrepresentations are not specifically outlawed by Section 1510, the Court of Appeals should have directed the dismissal of counts of the indictment in which at most there were attempts to cause misrepresentations to be made, and should have held erroneous jury instructions that an attempt was sufficient to consummate the crime.

II. THE TERM "MISREPRESENTATION" IN 18 U.S.C. sec. 1510, MUST BE INTERPRETED TO INCLUDE ELEMENTS OF BOTH INTENT AND EFFECT OF DECEIVING.

The Court of Appeals upheld the District Court's definition of "misrepresentation" for the jury to be "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts."

The term "misrepresentation" is not specifically defined in either the statute or its legislative history. Accordingly, its ordinary, accepted definition applies. United States v. Alpers, 338 U.S. 680 (1950). Because it is a technical term, it must be considered as having been used in its technical sense, nothing else appearing. Kepner v. United States, 195 U.S. 100 (1904).

The court in United States v. Neustadt, 366 U.S. 696 (1961), stated that the common law definition of misrepresentation applied to a statute using that term unless the usual rules of construction indicate otherwise. There the court cited with approval

the hornbook identification of misrepresentation with the common law action of deceit. 366 U.S. at 711 and n.26. The required elements of misrepresentation therefore, are (1) a false representation of fact, (2) known or believed to be false, (3) with an intention to induce reliance, and (4) upon which there is justifiable reliance. W. L. Prosser, Law of Torts, 683-686 (4th Ed. 1971). See Haigh v. White Way Laundry Co., 164 Iowa 143, 145 N.W. 473, 474; Reed v. Travelers Insurance Company, 227 Mo.App. 1155, 60 S.W.2d 59, 64; State Medical Association v. Committee for Chiropractic Education, 236 S.W.2d 632, 635 (Tex.Civ.App.). If the injured party knows the statement to be false, the essential element that he be deceived is absent. 37 C.J.S. Fraud, sec. 27, pp. 267-268; Manget v. Cunningham, 166 Ga. 71, 142 S.E. 543; Snyder v. Rhinehart, 274 Ky. 274, 118 S.W.2d 543, 547.

Had the court properly defined the term "misrepresentation", petitioner could not have been convicted under any of the counts of the bill of indictment. The witness Angel told petitioner that he did not believe the latter's statement that he had been paid only $50.00 and not $500.00. The witnesses Coble and Myrick both testified that petitioner had misrepresented nothing to them. No misrepresentation was made to the witness Cindy L. Wyrick because she herself had not paid petitioner any money. The witnesses James M. Wyrick and Francis A. Wyrick were not deceived, because they knew and had already told the government agents how much they paid petitioner, before the time he engaged them in the recorded telephone conversations.

III. IT IS ERROR TO INSTRUCT THE JURY THAT IGNORANCE OF THE LAW IS NOT A DEFENSE UNDER 18 U.S.C. sec. 1510, WHICH CONTAINS THE ELEMENT OF WILLFULNESS.

The statute 18 U.S.C. sec. 1510(a) contains the element of willfulness. This court recently settled it that willfulness means a "voluntary, intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12 (1976).

The Court of Appeals approved the District Court's jury instruction containing the presumption that every person knows what the law forbids, and stating that it is not necessary for the prosecution to prove that petitioner knew his actions were in violation of the law.

If the term "willful" is to be given the meaning approved in United States v. Pomponio, ignorance of the law must be excused. An accused must know of his legal duty before he can be held criminally accountable for violating it. In plain, common sense terms this means that he must know the law. It is equally plain and common sensical that if he is ignorant of the law, he cannot be acting willfully. It is completely contradictory and highly prejudicial to the defendant to charge on the one hand that willfulness means the violation of a known legal duty, but on the other hand to instruct that ignorance of the law is no excuse.

CONCLUSION.

For the reasons set forth above, it is respectfully requested that this court

issue its writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

Counsel for Petitioner

Norman B. Smith
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, N. C. 27401
Telephone: 919-274-2992

Richard J. Tuggle
James N. Duggins, Jr.
Tuggle, Duggins, Meschan,
Thornton & Elrod
228 West Market Street
Greensboro, N. C. 27401
Telephone: 919-378-1431

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2097

UNITED STATES OF AMERICA,

Appellee,

vs.

JAMES L. SWISHER,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro, Hiram H. Ward, District Judge.

Argued: May 4, 1978 Decided: September 27, 1978

Before HAYNSWORTH, Chief Judge, RUSSELL, Circuit Judge, and FIELD, Senior Circuit Judge.

Norman B. Smith (Smith, Patterson, Follin, Curtis, James & Harkavy on brief) and James N. Duggins, Jr., (Richard J. Tuggle, Tuggle, Duggins, Meschan, Thornton & Elrod on brief) for Appellant; Benjamin H. White, Jr., Assistant United States Attorney (H. M. Michaux, Jr., United States Attorney on brief) for Appellee.

PER CURIAM:

The defendant/appellant appeals from his conviction by a jury of knowingly and wilfully endeavoring by means of misrepresentation to obstruct, delay and prevent a communication by a named individual of information relating to violation of § 7201, 26 U.S.C. to special agents of the Internal Revenue Service who were authorized and were conducting an investigation, in violation of § 1510, 18 U.S.C.

The defendant contends that the evidence was insufficient to support his conviction; that the Court erred in its instructions to the jury; and that the Special Agent of the Internal Revenue Service was acting without authority or legal process in requesting information and documents from defendant's clients.

Our examination of the record persuades us that there was ample evidence to sustain the jury's finding of guilty. We find the other claims of error without merit.

Perceiving no error of law or fact, the judgment of conviction is

AFFIRMED.